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Signing and Correcting Deposition

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difficult to perceive why abuses would occur more readily in negligence or wrongful death actions than in any other actions.[197]

It should be indicated that the principal case involved a malpractice action against a doctor, rather than an attorney. A malpractice suit against either one skilled in the science of medicine[198] or one proficient in the practice of law[199] is based upon a failure to exercise the skill requisite to his profession and is, therefore, tortious in nature. But the difference between these two malpractice categories (medicine as against law) lies in the basis of damages. In an action against a doctor the damages recoverable are for personal injuries;[200] against an attorney the basis of damages is the amount the plaintiff would have recovered had the action not been negligently handled.[201] Consequently, it appears that interrogatories would be permissible in a malpractice action against an attorney but not in one brought against a doctor.

Whereas interrogatories may be used in numerous actions,[202] it appears they will be used primarily in commercial cases, and transactions, especially those involving corporations.[203] Where statistical matter or detailed lists of sales or lists of articles manufactured are needed, it is more appropriate to obtain these through interrogatories, to which answers may be compiled at the answerer's leisure rather than through a deposition which is taken at a single sitting.[204]

Signing and Correcting the Deposition

In *Marine Trust Co. v. Collins*,[205] a witness, following his pretrial examination, undertook to make corrections in his deposition before signing it. He assigned as his reasons that the corrections were made "to give an accurate statement thereof and to correct

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[197] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3130.02 (1963).

[198] Colvin v. Smith, 276 App. Div. 9, 92 N.Y.S.2d 794 (3d Dep't 1949).

[199] Strauss v. New Amsterdam Cas. Co., 30 Misc. 2d 345, 347, 216 N.Y.S.2d 861, 864 (N.Y. Munic. Ct. 1961).

[200] Colvin v. Smith, *supra* note 198.

[201] See Wade, *The Attorney's Liability For Negligence*, 12 VAND. L. REV. 755, 772 (1959).

[202] Interrogatories might, perhaps, be used in defamation actions where the basis of damages is injury to reputation. See PROSSER, TORTS 574 (2d ed. 1955); SEELMAN, LAW OF LIBEL AND SLANDER IN THE STATE OF NEW YORK 1 (1933); SPRING, RISKS AND RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING AND THE THEATER 41 (2d ed. 1956).

[203] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3130.05, at 31-246 (1963).

[204] *Id.* at 31-247.

[205] 19 App. Div. 2d 857, 243 N.Y.S.2d 993 (4th Dep't 1963).

errors by the reporter in the transcription of my [the witness'] testimony." The court held that while it is permissible for a witness to make changes on a deposition before signing it, he must give "the reason therefor—either that it is an incorrect transcript or that his present recollection of the facts is more accurate—and he may then state what his corrected answer is and give any other explanation he desires with respect to his prior answer."

It has been the established procedure to permit a witness to make any changes in a deposition before signing it.[206] However, an omnibus statement as to the reason for correction will not be sufficient under the CPLR, whatever its acceptance was under the CPA. Rather, the transcript of the testimony should indicate what the original testimony was, what the corrected testimony is, and finally, whether the corrections are due to a challenge to the stenographer's accuracy or a desire on the part of the witness to change his testimony. There is prior case law to just that effect.[207] The reason for this requirement of specificity is obvious—if the accuracy of the stenographer is challenged, the party taking the deposition will put the stenographer on the witness stand to testify that he took the statement accurately[208] and thereby raise a question of credibility. In addition, this procedure will enable the trial court to compare the original form of the answer with the corrected answer to determine which one should be credited.[209]

ACCELERATED JUDGMENT

Objection to Jurisdiction Raised in the Answer — Getting an Early Disposition

In *Kukoda v. Schneider*,[210] a personal injury action, defendant objected to the court's jurisdiction by way of an affirmative defense in his answer, a CPLR procedure unknown to the CPA. Plaintiff then moved to dismiss the affirmative defense on the ground that no defense was stated.[211] The court held that although the

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[206] *E.g.*, Skeaney v. Silver Beach Realty Corp., 10 App. Div. 2d 537, 201 N.Y.S.2d 163 (1st Dep't 1960); Columbia v. Lee, 239 App. Div. 849, 264 N.Y. Supp. 423 (2d Dep't 1933); Gottfried v. Gottfried, 197 Misc. 562, 95 N.Y.S.2d 561 (Sup. Ct. 1950); Hayes v. City of N.Y., 98 N.Y.S.2d 424 (Sup. Ct. 1950); American Worcestershire Sauce Co. v. Armour & Co., 194 Misc. 745, 87 N.Y.S.2d 738 (Sup. Ct. 1949).

[207] Mansbach v. Klausner, 179 Misc. 952, 40 N.Y.S.2d 647 (Sup. Ct. 1943).

[208] *Id.* at 953, 40 N.Y.S.2d at 648.

[209] Columbia v. Lee, *supra* note 206, at 850, 264 N.Y. Supp. at 424.

[210] 41 Misc. 2d 308, 245 N.Y.S.2d 271 (Sup. Ct. 1963).

[211] CPLR R. 3211(b).